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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FISCAL FUNDING CO., INC., Plaintiff and Appellant, v. ALAN DONES et al., Defendants and Respondents.	A135451 (City and County of San Francisco Super. Ct. No. CPF-10-510388)

This appeal arises out of an arbitrator's order disqualifying Fiscal Funding Co., Inc.'s counsel, Calvin Grigsby. Fiscal Funding attempted to overturn the arbitrator's disqualification order by filing a petition for a writ of mandate in superior court. The superior court granted Respondents' motion for judgment on the pleadings on the ground that it lacked jurisdiction to hear the writ petition. The court subsequently awarded Respondents fees and denied Fiscal Funding's motion to set aside. Fiscal Funding now appeals the superior's court orders granting the motion for judgment on the pleadings, denying the motion to set aside, and awarding attorney's fees and costs. We find no error and affirm.[1]

[1] Respondents argue that Fiscal Funding's appeal is untimely. They raised the same argument in their motion to dismiss and strike this appeal. That motion was denied. We decline to revisit the issue.

I.

BACKGROUND

The arbitration at issue involves a dispute between the managers of Strategic Urban Development Alliance (SUDA), a real estate transaction management firm founded by Alan Dones and John Guillory. In 1998, Grigsby loaned SUDA approximately $719,000. In exchange, Fiscal Funding, an entity created and controlled by Grigsby, received a 20 percent interest in SUDA. In 2003, Dones, Guillory, and Grigsby, on behalf of Fiscal Funding, executed the SUDA Operating Agreement (the Agreement) and appointed themselves as members and managers of the organization. Among other things, the Agreement provides that any controversy arising out of the Agreement shall be settled by arbitration in Oakland, California in accordance with the rules of the American Arbitration Association (AAA).

In March 2008, Fiscal Funding filed the arbitration action at issue here against Dones, Guillory, and SUDA. Among other things, Fiscal Funding alleged that Dones and Guillory transferred the residential development rights of SUDA property to third parties for improper consideration, Fiscal Funding and Grigsby were wrongfully frozen out of the management of the company, Dones borrowed at least $1.7 million for personal use from trust funds held for SUDA clients, and Dones and Guillory used SUDA funds to make payments of approximately $250,000 to personal relatives. Fiscal Funding asserted causes of action for, inter alia, dissolution of limited liability company, unlawful dividend distribution, breach of fiduciary duty, and breach of contract.

Fiscal Funding was initially represented by the law firm of Rogers Joseph O'Donnell in the arbitration. In December 2009, Grigsby associated into the arbitration as Fiscal Funding's counsel. In a January 2010 letter to the arbitrator, Dones and Guillory argued that Grigsby had a conflict of interest because he had acted as SUDA's counsel of record on many of the issues that were being litigated in the arbitration.

On March 19, 2010, SUDA, Dones, and Guillory moved to disqualify Grigsby as counsel for Fiscal Funding. The arbitrator granted the motion and found that SUDA, Dones, and Guillory were entitled to attorney's fees incurred in connection with the

motion. Grigsby requested reconsideration, pointing out that the arbitration rules also allowed lay persons to represent a party in an arbitration. The arbitrator rejected this argument, finding that Grigsby's conflict of interest also precluded him from appearing as Fiscal Funding's authorized representative.

On April 30, 2010, about two weeks prior to the arbitration hearing, Fiscal Funding filed a petition for a writ of mandate against Dones and Guillory, their attorneys, the arbitrator, and the AAA (collectively, Respondents). The petition sought to reinstate Grigsby as Fiscal Funding's counsel in the arbitration.[2] Among other things, Fiscal Funding alleged that Dones and Guillory's insistence that Grigsby be disqualified as counsel amounted to a refusal to arbitrate, and thus sought an order to arbitrate pursuant to Code of Civil Procedure section 1281.2.

On February 15, 2011, pursuant to Code of Civil Procedure section 128.7, Respondents served on Fiscal Funding's former counsel a motion to dismiss and requested that it voluntarily dismiss the case. On March 15, 2011, after several extensions of the section 128.7 safe harbor period, Grigsby personally sent Respondents an email stating he would not dismiss the action. On April 14, 2011, Respondents moved for judgment on the pleadings arguing, among other things, that the superior court could not review an interlocutory order of the arbitrator. At the motion hearing, the trial court indicated it did not have jurisdiction to consider the writ petition. The court subsequently issued an order granting the motion for judgment on the pleadings.

On October 11, 2011, Fiscal Funding moved to set aside that order. Fiscal Funding argued that the arbitration was international in nature and, thus interlocutory review was available. In support, Fiscal Funding offered documents sent by an anonymous source that indicated that SUDA had invested over $1 million in development projects in Africa. At the hearing, the trial court stated that the documents were not evidence because they were not authenticated and, even if they were evidence, they did not provide grounds for reversing the court's previous decision.

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[2] The petition also sought the disqualification of Dones and Guillory's counsel. Fiscal Funding abandoned this issue on appeal.

On March 22, 2012, the trial court entered judgment in favor of Respondents and ordered Fiscal Funding to pay Respondents $55,698 in attorney's fees and costs incurred in connection with their motion for judgment on the pleadings and Fiscal Funding's motion to set aside.

While the parties litigated the writ petition, the arbitration proceedings continued. Though the proceedings were stayed in April 2010, the arbitrator lifted that stay in January 2011 on the ground that Fiscal Funding had not prosecuted the writ petition in a timely fashion. The arbitrator then set the arbitration hearing for September 26 through October 1, 2011. On August 23, 2011, the arbitrator suspended the hearings due to the parties' failure to pay the required fees. On February 16, 2012, the matter was terminated due to non-payment.[3]

II.

DISCUSSION

A. Jurisdiction

The trial court granted Respondents' motion for judgment on the pleadings on the ground that it lacked jurisdiction to hear Fiscal Funding's petition for a writ of mandate concerning the arbitrator's disqualification of Grigsby. Fiscal Funding now argues that the trial court erred in adjudicating jurisdiction. We review the trial court's jurisdictional determination de novo (see *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672), and find no error.

Fiscal Funding cites a great deal of California and federal authority holding that a trial court's interlocutory order disqualifying an attorney is subject to appellate review or review by an extraordinary writ petition. (See, e.g., *State Water Resources Control Bd. v. Superior Court* (2002) 97 Cal.App.4th 907, 913; *In re Shared Memory Graphics, LLC* (Fed. Cir. 2011) 659 F.3d 1336, 1340; *Petroleum Prods. Antitrust Litig.* (9th Cir. 1981) 658 F.2d 1355, 1356-1357.) We do not disagree with the principle. However, this appeal concerns a disqualification order by an arbitrator, not a trial court. The distinction is

[3] Respondents request that we take judicial notice of the February 16, 2012 letter from the AAA. The request is granted.

significant because the California Arbitration Act (CAA) provides only limited grounds for judicial review with respect to both interlocutory and final orders.

As an initial matter, we find that the trial court lacked jurisdiction to hear Fiscal Funding's writ petition because it concerned an interlocutory order. Once a matter is submitted to arbitration, "[i]t is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy. [Citations.] The arbitrator, and not the court, decides questions of procedure and discovery." (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 487-488 (*Titan*).) Thus, it is "wholly incompatible with established policies of the law to permit the court . . . to intervene in, and necessarily to interfere with, the arbitration . . . . In large measure, it not only would preclude the parties from obtaining 'an adjustment of their differences by a tribunal of their own choosing,' but it also would recreate the very 'delays incident to a civil action' that the arbitration agreement was designed to avoid." (*McRae v. Superior Court* (1963) 221 Cal.App.2d 166, 171.)

Thus, courts retain only "vestigial jurisdiction" over matters submitted to arbitration. (*Titan, supra*, 29 Cal. App. 4th at p. 487.) Upon the petition of a party, a court may "appoint arbitrators if the method selected by the parties fails [Code Civ. Proc.,] § 1281.6)[4]; grant a provisional remedy, 'but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief' (§ 1281.8, subd. (b)); and confirm, correct, or vacate the arbitration award (§ 1285)." With respect to the last option, the award must be in writing and "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." (§ 1283.4.) No other type of judicial intervention is permitted absent a contrary agreement by the parties.[5] (*Titan, supra*, 29 Cal.App.4th at p. 487.)

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[4] Unless otherwise specified, all future statutory citations are to the Code of Civil Procedure.

[5] In its appellant's reply brief, Fiscal Funding relies on out-of-state federal case law that was not raised in its appellant's opening brief for the proposition that a trial court may review the interlocutory orders of an arbitrator. We need not consider arguments raised for the first time on reply, and in any event, Fiscal Funding's new authority does not deal with

Fiscal Funding does not specifically address any of the statutory provisions discussed above. However, Fiscal Funding does contend that the disqualification order "effectively ended the arbitration without reaching the merits because, without the assistance of [Fiscal Funding's] owner, only employee and general counsel, [Fiscal Funding] was precluded from prosecuting the arbitration" and thus "had the legal effect of being final." The argument lacks merit. The disqualification order merely barred Grigsby from representing Fiscal Funding in the arbitration. It did not preclude Fiscal Funding from continuing to prosecute its case with new counsel. Moreover, a vacation of the order would not constitute a provisional remedy, which the statute defines as (1) attachments and temporary protective orders, (2) writs of possession, (3) preliminary injunctions and temporary restraining orders, and (4) appointment of receivers. (§ 1281.8, subd. (a).)[6] Nor did the disqualification order constitute a final arbitration award, as it did not resolve all questions submitted to the arbitrator. (See § 1283.4.)

Fiscal Funding also argues that Code of Civil Procedure section 1281.2 conferred on the superior court jurisdiction to compel arbitration, and that Respondents essentially refused to arbitrate by successfully moving to disqualify Grigsby as counsel. The argument is creative but meritless. We agree that the trial court had jurisdiction to compel arbitration, but there is no indication that Respondents refused to arbitrate. Rather, it appears that Fiscal Funding voluntarily declined to participate in the arbitration proceedings as a result of the disqualification order.

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the controlling Code of Civil Procedure sections at issue here. (See, e.g, *Genus Credit Mgmt. Corp. v. Jones* (D. Md. Apr. 6, 2006) 2006 U.S. Dist. LEXIS 16933.)

[6] "Section 1281.8 was enacted primarily to allow a party to an arbitration to obtain provisional judicial remedies without waiving the right to arbitrate . . . . The logical reason for the requirement that an applicant be required to show that an arbitration award may be rendered ineffectual is to ensure that the court does not invade the province of the arbitrator — i.e., the court should be empowered to grant provisional relief in an arbitrable controversy only where the arbitrator's award may not be adequate to make the aggrieved party whole." (*Woolley v. Embassy Suites, Inc.* (1991) 227 Cal. App.3d 1520, 1527.) Fiscal Funding has cited no authority suggesting that section 1281.8 could be construed to allow immediate review of an arbitrator's interlocutory orders.

Even if the Code of Civil Procedure allowed for review of interlocutory arbitration orders, the trial court lacked the power to vacate or correct the disqualification order at issue here. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10.) Thus, the merits of "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Id.* at p. 6.) There are, however, statutory safeguards for arbitration awards resulting from procedural irregularities, including where the arbitrator exceeded his or her powers. (See §§ 1286.2, 1286.6.)

Fiscal Funding contends that the arbitrator exceeded his authority by denying Fiscal Funding the right to designate Grigsby as the company's counsel or authorized representative. We disagree. Arbitration procedures that violate the common law right to a fair hearing are reviewable, but " 'only in the clearest of cases, i.e., when the applicable procedures essentially preclude the possibility of a fair hearing.' " (*Sanchez v. W. Pizza Enterprises., Inc.* (2009) 172 Cal.App.4th 154, 177.) In this case, the disqualification order did not preclude the possibility of a fair hearing since Fiscal Funding could have found new counsel and requested a continuance to bring that new counsel up to speed. Moreover, since Grigsby is admittedly not a litigator, Fiscal Funding might have been better off retaining outside counsel. While Fiscal Funding asserts that it appointed Grigsby to save money, it has presented no evidence that it could not afford other representation.[7]

Contrary to Fiscal Funding's contention, *Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881 (*Hoso Foods*), does not demand a different conclusion. In that case, the court found that an arbitrator exceeded his powers "by limiting appellant's

[7] Fiscal Funding also argues that "there [was] simply nothing for the arbitrator to decide" with respect to the motion to disqualify Grigsby, reasoning that the Agreement designated Grigsby as manager with the power to bring arbitration and the power to name counsel for the arbitration. But this argument goes to the merits of the arbitrator's decision, not whether the trial court had jurisdiction to review that decision.

representation at the arbitration [hearing] to an individual who had been sued personally, was not appellant's choice of representative, was not involved in significant aspects of the transaction, and was dismissed from the action at the conclusion of the hearing." (*Id.* at p. 884.) In contrast, in the instant action, the arbitrator merely barred Grigsby from assuming Fiscal Funding's legal representation, either as a lawyer or as lay counsel. Nothing prevented Grigsby from attending the arbitration hearing or participating as a corporate representative, client, or fact witness. Fiscal Funding's contention that the disqualification order somehow barred Grigsby from participating in the arbitration altogether has no basis in the record. Moreover, unlike in the instant action, the petition in *Hoso Foods* was filed after entry of the final arbitration award. (*Id.* at p. 886.)[8]

B. Arbitration of International Commercial Disputes

Fiscal Funding also contends that Code of Civil Procedure sections 1297.163, 1297.165, and 1297.61, which pertain to arbitration and conciliation of international commercial disputes, allow for interlocutory appeals where an arbitrator exceeds the scope of his or her authority. The argument lacks merit. Even if these provisions do apply to appeals of disqualification orders, this commercial dispute is not international in nature.[9]

Pursuant to Code of Civil Procedure section 1297.13, an arbitration or conciliation agreement is international if any of the following apply:

"(a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states.

"(b) One of the following places is situated outside the state in which the parties have their places of business:

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[8] Fiscal Funding's appeal as to the disposition of the motion for judgment on the pleadings is also moot. Since the disqualification order did not preclude the possibility of a fair arbitration hearing and the underlying arbitration has since been terminated, reinstatement of Grigsby as counsel for Fiscal Funding would have no practical effect.

[9] Moreover, Fiscal Funding's contention that the arbitrator exceeded his authority by disqualifying Grigsby is dubious. As discussed above, the disqualification order did not preclude the possibility of a fair hearing because Fiscal Funding could have found another attorney. (See *Sanchez v. W. Pizza Enterprises., Inc.*, *supra*, 172 Cal.App.4th at p. 177.)

"(i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement.

"(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed.

"(iii) The place with which the subject matter of the dispute is most closely connected.

"(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.

"(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state."

Based on the judicially noticeable pleadings and agreements at issue, there is no indication that any of the above criteria are applicable here. SUDA is a California limited liability company, Fiscal Funding is a California corporation, and Dones and Guillory are California residents. The Agreement states that arbitration would take place in Oakland, California and would be governed by the Commercial Arbitration Rules of the AAA, rather than the AAA's International Dispute Resolution Procedures. The Agreement also provides that SUDA was formed to engage in the acquisition, development, management, and ownership of certain real property located in Oakland, California. Moreover, the complaint Fiscal Funding filed with the AAA does not identify any out-of-state activity other than that Dones used SUDA funds to pay for trips abroad.

In connection with Respondents' motion for judgment on the pleadings, Fiscal Funding asserted that the subject matter of the arbitration was international because Fiscal Funding was challenging various disbursements made by SUDA, including those related to travel to Ghana.[10] But we cannot conclude that "a substantial part of the obligations of the

[10] On appeal, Fiscal Funding also points to a draft investment agreement between SUDA and Kampac Oil in the United Arab Emirates. But the agreement is not signed by SUDA, and based on the record prepared by Fiscal Funding, it is entirely unclear when or how this agreement was introduced in the proceedings below.

commercial relationship" took place outside California or that the subject matter of the arbitration "is otherwise related to commercial interests in more than one state" merely because a small fraction of the funds that were allegedly misappropriated were used for international travel.

Fiscal Funding later moved to set aside the order granting Respondents' motion for judgment on the pleadings. In support, it submitted new documents received from an anonymous source which purportedly showed that the arbitration was international in nature since SUDA had made substantial investments in development projects in Ghana. The trial court declined to vacate its decision based on this unauthenticated evidence. As the motion to set aside was essentially a motion for reconsideration, the order resolving that motion is not appealable. (See *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 158.) In any event, we agree with the trial court that Fiscal Funding failed to provide grounds to reconsider the order on the motion for judgment on the pleadings. The new documents were not evidence because they were not authenticated.

C. Award of Attorney's Fees and Costs

The trial court awarded Respondents $55,698 in connection with the fees and costs incurred as a result of their motion for judgment on the pleadings and Fiscal Funding's motion to set aside. Fiscal Funding argues the award was in error. We disagree. The Agreement provides that in the event of litigation or arbitration among SUDA's members, "the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses . . . , including, without limitation, reasonable attorney's fees and expenses." There can be no dispute that Respondents were the prevailing party in the proceedings below, and Fiscal Funding does not contend that the fees awarded were unreasonable.[11] Fiscal Funding argues that the award of attorney's fees

[11] Additionally, Respondents requested attorney's fees under Code of Civil Procedure section 128.7, which allows for the award of sanctions, including attorney's fees, in connection with frivolous filings. Section 128.7 sanctions are reviewed under the deferential abuse of discretion standard. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 441.) We need not determine whether the trial court abused its discretion in light of the clear and unambiguous attorney's fees provision in the Agreement.

is inappropriate because Respondents engaged in fraud by withholding evidence showing that SUDA was engaged in international business transactions and thus establishing that interlocutory review was available. However, as discussed in section II.B *ante*, this evidence was not authenticated.

III.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.